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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

FRED DIXON,

Defendant and Appellant.

B220989

(Los Angeles County
Super. Ct. No. TA089681)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen J. Webster, Judge. Modified and affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

This is the second appeal in this case. After a trial in which defendant Fred Dixon was convicted of second degree robbery with the use of a deadly weapon (Pen. Code, §§ 211, 12022, subd. (b)(1)),¹ he appealed. We affirmed the conviction, but remanded the matter to the trial court after determining that it had used alleged prior convictions to enhance defendant's sentence without conducting a trial to ascertain the truth of the allegations.² (*People v. Dixon* (Feb. 4, 2009, B202379) [nonpub. opn.].) On remand, after a bench trial, the court found defendant had suffered the two prior serious felony convictions as alleged and had served two prior prison terms. Defendant received a sentence of 35 years to life. He contends the sentence, which exceeded the term he received prior to the first appeal, violates the double jeopardy and due process clauses of the federal and state Constitutions and the trial court abused its discretion by failing to strike his two prior serious felony convictions. We will order that the abstract of judgment be corrected and, as modified, affirm the judgment.

DISCUSSION

I. The Court's Sentence Was Proper

At the first sentencing hearing, the court sentenced defendant to 26 years to life. Relying on case authority that holds a defendant may not receive a greater sentence after a retrial following a successful appeal (see, e.g., *People v. Henderson* (1963) 60 Cal.2d 482), defendant contends his 35-year-to-life sentence violates the prohibition against double jeopardy. Although the Attorney General acknowledges the general rule cited by defendant, he argues the rule does not apply when the original sentence was

¹ All further statutory references are to the Penal Code.

² We granted the Attorney General's request to take judicial notice of the file in defendant's first appeal. The information alleged that defendant had suffered two prior serious felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b) through (i), 1170.12, subds. (a) through (d)) and section 667, subdivision (a) and had served four prior prison terms (§ 667.5, subd. (b)).

unauthorized. He urges the sentence defendant initially received was unauthorized and the trial court had the ability to correct the legal error, even if it resulted in a longer term than that originally imposed. The Attorney General is correct.

In *People v. Serrato* (1973) 9 Cal.3d 753 (disapproved of on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1), the Supreme Court noted that, where a lawful sentence is imposed after the first trial, the “California Constitution’s guarantee against double jeopardy (art. I, § 13) precluded the imposition of a more severe sentence upon retrial. [Fn. omitted.]” (*Id.* at p. 764.) There is a caveat. “The rule is otherwise when a trial court pronounces an unauthorized sentence. Such a sentence is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement. [Fn. omitted.]” (*Ibid.*)

In the present case, the court’s original sentence was 26 years to life. Although the court refused to strike defendant’s two prior convictions for purposes of the Three Strikes law, it neglected to impose the mandatory five-year terms pursuant to section 667, subdivision (a). The court lacked the authority to strike the section 667, subdivision (a) priors (§ 1385, subd. (b)), and the sentence was unauthorized. Upon remand, the court had the power to correct the sentence and to impose the required five-year terms without violating defendant’s right against being placed twice in jeopardy.

None of the cases cited by defendant involved an original sentence that was unauthorized. For example, in *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, the trial court was prohibited from imposing a greater sentence on remand because it “imposed a legal aggregate sentence, only fashioning it in an unauthorized manner. The court’s error in separating the convictions from their attendant enhancements, though unauthorized by law, does not make the total sentence illegal.” (*Id.* at pp. 1311-1312.) In *People v. Torres* (2008) 163 Cal.App.4th 1420, the court held the rule against double jeopardy applied because the original sentence could have been lawfully imposed; “it did not fall below the mandatory minimum sentence and was therefore not a legally unauthorized lenient sentence.” (*Id.* at p. 1432.) As discussed, the original sentence in this case fell

below the mandatory minimum sentence that could have been imposed due to defendant's prior serious felony convictions. Defendant's authorities do not assist him.

II. The Court Properly Declined to Strike Defendant's Prior Convictions

Prior to sentencing, defendant filed a motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and requested that the court strike one of his two prior serious felony convictions. The court declined to do so. Defendant asserts the court abused its discretion because it considered only his record and not the individualized mitigating factors that applied. We disagree.

“[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) In light of the strong presumption that a Three Strikes sentence conforms to the sentencing norms set forth in the statute, “a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation].” (*Id.* at p. 378.) Neither situation occurred here.

The trial court announced that it was “well aware of the fact that it does have the power to [grant] the *Romero* motion” and proceeded to explain why it was denying defendant's request. The court cited defendant's “life of crime, destruction, violence,” and recidivism. It noted the similarity of the facts surrounding defendant's prior manslaughter conviction and the present case. Although defendant points out that his strike convictions occurred in 1978 and 1986 and argues that the court failed to take the age of his priors into account, he is incorrect. The court noted defendant's “life of crime” and found defendant did not warrant the relief he sought. The record supports the court's conclusion.

Defendant was 18 when he suffered his first felony conviction in 1972. Indeed, in 1972, he was convicted of felonies in three separate cases. After his 1978 robbery conviction, he was sentenced to prison and was paroled in March of 1980. Thirteen months later, he was returned to prison on a parole violation. He was ultimately paroled on the robbery charge in February 1984. In December 1984, he was arrested for the offense that led to his 1986 conviction for voluntary manslaughter. After being paroled, he was returned to prison in 1997 for violating parole. In 2000, defendant was convicted of petty theft with prior convictions and placed on probation. In 2001, while on probation for the petty theft conviction, he was arrested and charged with possessing a controlled substance. In May 2001, defendant was convicted and sentenced to state prison, returning again in October 2006 for a parole violation. He was paroled on January 16, 2007, and was arrested on the present case less than two months later on March 11.

At the time he was sentenced on this case, defendant stood convicted of eight felonies. He has spent virtually his entire life in custody since 1978, with the exception of a brief respite prior to his October 2006 return to prison. “In determining whether a prior conviction is remote, the trial court should not simply consult the Gregorian calendar with blinders on.” (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) The important question is whether the individual seeking leniency has learned from his or her mistakes and has demonstrated a willingness to abide by the law. Clearly, defendant has not. The court considered the circumstances of the present offense and defendant’s criminal history and determined that striking a prior conviction would not be a proper exercise of its discretion. We discern no abuse.

III. The Abstract of Judgment Must Be Corrected

The trial court stayed the two section 667.5, subdivision (b) prison priors. As the Attorney General correctly observes, the court was required to strike the sentence or impose it. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) He concedes the court did not intend to impose the sentence for either enhancement, thus the abstract of

judgment must be amended to include a notation that they are stricken. We note that the court struck the section 12022, subdivision (b) enhancement, but it is reflected in the abstract as stayed. The abstract must similarly be amended to indicate that the enhancement is stricken.

DISPOSITION

The clerk of the superior court is directed to amend the abstract of judgment by indicating that the two section 667.5, subdivision (b) and section 12022, subdivision (b) enhancements are stricken and to forward a copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

MANELLA, J.